No. 82-1050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

ROBERT H. MATHEWS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL WOMEN'S LAW CENTER, OLDER WOMEN'S LEAGUE, PENSION RIGHTS CENTER, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

Amici American Civil Liberties Union, National Women's Law Center, Older Women's League, Pension Rights Center, Women's Equity Action League, and Women's Legal Defense Fund file this brief with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

Amici are organizations dedicated to achieving equal justice under law for women and men. They share an abiding conviction that gender based discrimination casts the weight of the government on the side of traditional notions about male/female behavior, shows up artificial barriers to the attainment by women and men of full human potential and retards society's progress toward equal opportunity.

This case presents the question of whether a reenacted facially discrimina-

tory law may now survive equal protection review where the provision again accords employment-derived benefits more generously to male Social Security covered workers than to female Social Security covered workers. Amici regard this Court's response to the question as critical to recognition of the equal status and dignity of female wage earners.

This case also presents the question of whether Congress may, without offending basic notions of the separation of powers, attach such Draconian consequences to the challenge of an impermissibly underinclusive statutory scheme as to effectively preclude judicial review. The Court's response to this question could be of critical importance to civil rights and civil liberties in a wide variety of contexts.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as presented in the Brief of Appellees.

SUMMARY OF ARGUMENT

I

In Califano v. Goldfarb, 430 U.S. 199 (1977) this Court held that a provision of the Social Security Act which required automatic payment of spousal benefits to all widows, but which required widowers to prove dependency on their deceased spouses, was unconstitutional sex discrimination. In response, Congress passed a statute governing social security spousal benefits of federal and state government employees, the pension offset provision, which inter alia reenacts for a transitional period precisely the same scheme invalidated in Goldfarb. It requires men but not women to prove dependency on their spouses in order to receive full Social Security spousal benefit.

Because the classification at issue is explicitly gender based, the

government has the burden of showing that it is closely and substantially related to an important governmental interest. This is not a statute which may be scrutinized under a rational basis analysis. It does not come within any of the judicially recognized circumstances in which gender based classifications have been upheld. It does not compensate for past discrimination against women. Indeed, it perpetuates discrimination against working women by undervaluing the Social Security benefits they have earned for their spouses and by continuing to treat men as economically more significant than women.

The reenacted scheme, no less than its predecessor, is based upon sex-role stereotypes, and therefore cannot survive heightened scrutiny analysis. The reliance of women on spousal benefits earned by their husbands is conclusively presumed. Similarly situated men, however,

are conclusively presumed not to have relied upon being able to receive spousal benefits earned by their wives.

Under the reenacted law, the reliance interests of the spouses of male Social Security workers are preferred over the reliance interests of similarly situated spouses of female workers where the former relied upon an unconstitutional law and the latter on a decision of this Court. The just and orderly processes of government, upon which all citizens rely, regardless of their sex, includes equally the processes of all branches of government. Reliance on the processes of the legislative branch cannot be preferred over reliance on the judicial process.

The statutory scheme is insufficiently narrowly tailored to survive heightened scrutiny analysis. If legislative action is deemed appropriate to protect legitimate reliance it must not reenact

and perpetuate a discriminatory scheme when non-discriminatory action could more narrowly serve the same interest. Congress could have required both men and women to prove dependency or allowed both men and women to demonstrate actual reliance on receipt of spousal benefits.

II

Recognizing that it had reimposed an unconstitutional scheme in the teeth of a decision by this Court, Congress in violation of the separation of powers, added a provision that required that if the Court held this discriminatory scheme unconstitutional, it would be required to invalidate the exception to the pension offset; both men and women must lose the right to full spousal benefits.

This so-called severability clause has the intent and effect of insulating unconstitutional discrimination from

judicial review and thus is violative of the separation of powers. This Court has always protected each of the coordinate branches of government from encroachment by the other branches. This case poses a new and dangerous challenge to judicial review. Congress has sought to exercise a legislative veto over the judiciary by reenacting an invalidated law coupled with a provision which effectively precludes the exercise of judicial review in three ways. First, it deprives plaintiffs of Article III standing to challenge the law by providing that success on the merits cannot be translated into a tangible benefit. Second, because the Court is required to rescind the entire exception to the pension offset provision, it is, in effect, deprived of jurisdiction to order any other result. Third, Congress has created an enormous disincentive, a virtual penalty, to anyone resorting to the

judicial process to challenge the blatantly unconstitutional eligibility scheme. Thus the severability clause is an unconstitutional intrusion by the legislature into the exercise by this Court of its equity jurisdiction.

ARGUMENT

Introductory Statement

On March 2, 1977, this Court ruled that a provision of the Social Security Act which required automatic payments of spousal benefits to all widows, but which required widowers to prove dependency on their deceased spouses, constituted unlawful sex discrimination. Califano v. Goldfarb, 430 U.S. 199 (1977). The provision invalidated in Goldfarb established, in effect, a conclusive presumption of women's dependency. The twin evils which it perpetuated were (1) a reliance on stereotypical thinking which treated men as economically more

significant than women;[1] and (2) a discriminatory undervaluing of the Social Security retirement benefits earned by women.[2] Shortly after deciding Goldfarb, which involved spousal eligibility for survivorship benefits, this Court summarily affirmed two lower court decisions which had invalidated similar sex-differentiated rules governing spousal eligibility for old-age, as opposed to survivorship

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1. See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Prior to Goldfarb, there was, in effect, an irrebuttable presumption that all widows were dependent on their deceased spouses and a rebuttable presumption that no widower was dependent on his deceased wife.

2. Under pre-Goldfarb law, retirement benefits earned by identically situated men and women covered by Social Security were not of equal worth. Benefits earned by men included the value of an automatic payment to a surviving widow. Benefits earned by women included payments to a surviving husband only if he could prove dependency.

benefits. Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430 U.S. 924 (1977).[3]

Under the Social Security system, when both spouses have worked in covered employment, each worker's spousal benefits are reduced by the amount she or he receives on her or his own account. Social Security Act, 42 U.S.C. § 402(k)(3). Since many federal and state government workers are not covered by Social Security, they have no direct benefits against which to reduce spousal benefits. Prior to Goldfarb, where the government employee

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3. Old age benefits for the spouses of workers covered by Social Security were automatically payable to wives pursuant to a conclusive presumption of dependency, while husbands seeking benefits as a result of a spouse's eligibility were required to prove dependency. As with the survivorship benefits at issue in Goldfarb, the old age benefits were distributed pursuant to sex-role stereotyping and in a manner which substantially undervalued the economic worth of a working woman's benefits in comparison with an identically situated working man's.

was a woman married to a man covered by Social Security, spousal benefits were available to her without regard for dependency. Where, however, the government employee was a man married to a woman employee covered by Social Security, he would not have received spousal benefits in the absence of proof of dependency. The net effect of Goldfarb, therefore, was to increase the payments to which he would be entitled since he was now eligible for a spousal benefit on the same basis as similarly situated women, without regard to dependency.

Congress, characterizing such an increase in payments to men as a "wind-

fall,"[4] elected to establish a pension offset for state and federal government employee retirement benefits. Under Congress' plan, spouses of employees who were covered by Social Security would be required to offset the spousal benefits against their respective government employees retirement benefits.[5]

The application of the pension offset concept to government retirement benefits returned men to their pre-Goldfarb status by eliminating their ability to enjoy a full Social Security spousal benefit along with their government retirement benefits. However, the "pension offset" adversely affected women who, pre-Goldfarb,

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4. Curiously, Congress never viewed similar payments to women, either pre-or post-Goldfarb, as windfalls. Indeed, this case is about Congress' attempt to permit women to continue to receive such payments.

5. Section 334 of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 15. 44-47, 42 U.S.C. § 402 (Supp. IV).

would have enjoyed both spousal benefits and a government retirement pension. This case arises out of the government's attempt to permit such women, but not identically situated males, to continue this favored status.

In order to permit women (but not men) to enjoy both spousal Social Security benefits and government retirement benefits, Congress exempted government employees eligible for retirement prior to December, 1982 from the pension offset if, prior to Goldfarb, they would have qualified for both spousal benefits and government employee benefits. Since, prior to Goldfarb, women automatically qualified for spousal benefits pursuant to a conclusive presumption of dependency, the effect of Congress' action was to use a grandfather clause to re-impose permanently the unconstitutional scheme condemned in Goldfarb on all individuals who

became eligible for retirement between December, 1977 and December, 1982. For these individuals, eligibility for spousal benefits continued to be sex-differentiated, with women government employees being treated in a sex-stereotyped manner as conclusively presumed to be both dependent on their husbands and to have relied upon an unconstitutional scheme.

In response to Goldfarb, Congress could, of course, have adopted an across the board policy of requiring all spousal Social Security benefits to government retirees to be conditioned on a showing that the spouse was dependent on the covered worker. In fact, for the first six months of 1983, Congress utilized just such an approach. § 7, Pub. L. No. 97-455 (1983). In connection with the administration of such a plan, Congress may well have been entitled to establish sex-neutral rebuttable presumptions to ease the administrative burden. As a means of limiting

spousal Social Security payments to retired government workers, however, Congress chose to reinstate the pre-Goldfarb unconstitutional scheme.

Recognizing that it had re-enacted an unconstitutional scheme in the teeth of a decision of this Court condemning it as violative of the Fifth Amendment, Congress added a clause which provided that if the discriminatory scheme were invalidated, all government employees -- both men and women -- could lose the opportunity to enjoy spousal benefits without pension offset.

I. CONGRESS' ATTEMPT TO RE-ENACT THE SCHEME WHICH THIS COURT HAD EXPLICITLY INVALIDATED VIOLATES THE FIFTH AMENDMENT.

This Court held in Goldfarb that spousal Social Security benefits could not be allocated pursuant to sex-differentiated rules which treated women, but not men, as conclusively dependent on their

spouses. The intent and effect of Congress' action in enacting the statute at issue in this case was to perpetuate against every government employee entitled to Social Security benefits who became eligible for retirement between December, 1977 and December, 1982 the very discrimination which this Court condemned in Goldfarb. As to that group, Goldfarb simply never happened.

The Solicitor General concedes, as he must, that Goldfarb is the law of the land and that Congress may not subvert this Court's constitutional decisions by re-enacting unconstitutional statutes. He argues, however, that Congress' action is defensible as a reasonable attempt to provide for a transitional period to assist persons who would be adversely affected by the application of the pension offset concept to government pension benefits but who were too close to retire-

ment to make alternative plans. It may well be that a form of transitional assistance was appropriate for persons whose retirement plans were upset by Congress' extraordinary reaction to Goldfarb. However, there were a variety of non-discriminatory forms such assistance could have taken without re-imposing an unconstitutional scheme on thousands of employees. Reliance upon a course of unconstitutional conduct cannot possibly provide a justification for a conscious continuation of such conduct by the legislature. If, for example, increased Social Security payments had, at some point in our history, been payable only to whites, a decision of this Court invalidating such a practice could not possibly have been validly met with a new statute continuing all such racially discriminatory payments during a "transitional" period. Where ameliorative government

action is appropriate, it must be narrowly tailored, and must not reenact and perpetuate a concededly unconstitutional scheme.

A. The Classification at Issue Here Must be Subjected to Heightened Scrutiny.

The government concedes, as it must, that the exception to the pension offset provision incorporates a facial gender distinction. See, e.g., App. Br. 11, 17.[6] Thus, under Craig v. Boren, 429 U.S. 190 (1976), in order to survive it must be closely and substantially related to the achievement of an important governmental interest, and the proponent of such a facial gender based distinction must bear the burden of showing an "exceedingly persuasive justification for the classi-

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[6] Amici agree with appellee, however, that the statute may read to preserve its constitutionality, see Motion to Affirm pp. 7-11.

fication." Mississippi University for Women v. Hogan, ___ U.S. ___, 100 S.Ct. 3331, quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). The government's reliance on cases upholding allegedly similar provisions as having only a rational basis, e.g., United States v. Ptasynski, ___ U.S. ___, 51 U.S.L.W. 4674 (June 6, 1983)("windfall" profits tax); United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4 (1969); United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980); and New Orleans v. Dukes, 427 U.S. 297 (1973), is misplaced. None of these cases involved gender based or any other inherently invidious classifications which are entitled to greater than minimal scrutiny. For example, in New Orleans v. Dukes, decided shortly before Craig v. Boren, the Court was careful to note that the minimal scrutiny afforded a city ordinance which

drew a distinction based on length of time in business was justified since the classification neither "trammel[ed] fundamental personal rights [n]or [was] drawn upon inherently suspect distinctions ..." 427 U.S. at 303. By contrast, although sex classifications have not been accorded the same intense scrutiny as race and religion classifications, this Court has recognized that "[c]lassifications based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination[,]" Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) and has therefore reviewed official resort to explicit gender based criteria skeptically and scrupulously. See Orr v. Orr, 440 U.S. 268 (1979); Mississippi University for Women v. Hogan.

The Solicitor General makes the curious argument that although "[t]he gender-based classification incorporated in the

exception clause was a conscious and deliberate enactment by Congress ... " it is "not motivated by sexist animus." (App. Br. p. 42, emphasis added). Such a pronouncement ignores the history of sex discrimination, which is rarely based upon hatred in the sense that race discrimination is. The benign protective purposes of much gender-based discrimination have not mitigated their harmful effects upon women, see, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873); Goesaert v. Cleary, 335 U.S. 464 (1948), or reduced the appropriate measure of scrutiny, Orr v. Orr.

Similarly, although certain so-called "grandfather" clauses may be acceptable because the lines they draw have a rational basis, e.g., New Orleans v. Dukes, United States Railroad Retirement Board v. Fritz, this case involves a "grand-

father" clause in its worst and unacceptable sense, the re-establishment of outlawed inequality. In Guinn v. United States, 238 U.S. 347 (1915) the Court invalidated a "grandfather" clause of Oklahoma's constitution under which all voters were required to be literate except persons descended from persons who were entitled to vote on January 1, 1866 or who had at that time resided in a foreign nation. The Court found that the obvious effect was to impose a literacy test only on former slaves and their descendants. Here too the obvious effect of the challenged legislation is to resurrect a burden to a class, but on the basis of its gender. See also Lane v. Wilson, 307 U.S. 268, 275 (1939)(the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination"). The rational basis standard does not suffice under these circumstances.

B. The Sex-Based Classification at Issue is Not Closely and Substantially Related to an Important Governmental Interest.

1. The Sex Based Classification at Issue is Freighted With the Baggage of Sexual Stereotypes and Diminishes the Value of Women's Work.

The statute at issue here is not one of the few types of laws which have survived heightened scrutiny. This is not a statute, nor is it claimed to be a statute, which may truly be said to have a compensatory purpose or be based upon an identified need for affirmative action. Unlike the statute challenged in Califano v. Webster, 430 U.S. 313 (1977), Congress in this instance neither had nor relied on statistics (or indeed any real evidence) indicating that women federal and state workers had any need to be compensated for past discrimination in receipt of either Social Security or government

pensions.[7]

Nor can the sex-based classification at issue here be defended by resort to cases in which this Court has sustained sex classifications on the grounds that men and women were not similarly situated. This is not a case involving the military, such as Schlesinger v. Ballard, 419 U.S. 498 (1975) or Rostker v. Goldberg, 453 U.S. 57 (1981), where differential treatment of men and women was based upon an underlying policy of barring women from

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7. That women generally, and elderly women in particular, are relatively poorer than men is beyond dispute, but not particularly relevant here, as neither this legislation nor the Social Security Act generally purports to deal with the problem of need. Alleged reliance "not need is the criteria for inclusion," Califano v. Goldfarb, 430 U.S. at 213. Despite the Solicitor General's citation of Kahn v. Shevin, 416 U.S. 351 (1974), no conscious "legislative decision to favor females in order to compensate for past wrongs" is argued here and there was no showing before Congress that the administrative cost of extending benefits to non-dependent men would exceed the cost of holding hearings on dependency or reliance. Cf. Califano v. Goldfarb, 430 U.S. at 222 (Stevens, J., concurring).

combat positions. Nor is it a situation where a distinction was justified because of a unique physical characteristic of one sex as was the case in Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (statutory rape laws directed at men only are constitutional because only women can become pregnant). Here men and women are identically situated except for their treatment under the pension offset exception provision.

In the statute challenged here Congress reinstated the identical eligibility test that was struck down in Goldfarb "as it was in effect and being administered." The semantic, but meaningless, changes in the purported grounds for the sex-based distinction apparent in parts of the legislative history cannot obscure this indisputable fact. The justification recited in the legislative history of the Social Security Amendments of 1977, like the

discrimination against men in Goldfarb which was the "accidental by-product of a traditional way of thinking about females", 430 U.S. at 223 (Stevens, J., concurring), is based upon "traditional ways of thinking" about both men and women. As such it is not closely and substantially related to an important governmental interest.

First, the statute conclusively presumes that women, because they are women, relied upon the receipt of full spousal benefits even though many of the women of concern to Congress were either expressly not covered by the provision or were those least in need of such protection. For example, the Conference Report refers to an uncertain and undocumented[8] "large numbers of women, especially widows in their late fifties, who are already draw-

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8. "[T]here may be large numbers. . ." H.R.Conf. Rep. No. 95-837, 95th Cong., 1st Sess. (1977) at 72 (emphasis added).

ing pensions, or who would be eligible to drawn them within five years of the enactment of this bill ... people already retired or close to retirement .... " H.R. Conf. Rep. No. 95-837 at 72 (emphasis added); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. (1977) at 72 (emphasis added). The conferees focused mechanically upon the emotionally charged image of "widows" who are already retired or very close to it even though the exception applies with equal force to women whose husbands are living and was completely unnecessary for those already retired. Those already retired, both men and women, were protected from the pension

offset provision;[9] it was entirely prospective in effect.[10] Thus, expressions of concern for the "already retired"

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9. The offset requirement applies only to spousal benefits payable "on the basis of application filed in or after the month [December, 1977] in which this Act is enacted." Section 334(f) of the Social Security Amendments of 1977, P.L. 95-216, 91 Stat. 1544. Thus both male and female federal and state workers who had already retired and applied for spousal benefits prior to December 1, 1977 would continue to receive unreduced spousal benefits regardless of the newly enacted pension offset.

10. The government's reliance on cases such as Lemon v. Kurtzman (II), 411 U.S. 192 (1973) and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) is inapposite. These cases define the situations in which a judicial decision in a civil matter should not apply retroactively. However, there is no question of the retroactivity of the Goldfarb decision; people already retired at the time of Goldfarb, and those who retired and applied for benefits prior to December, 1977, continued to receive full spousal benefits. The exception to the pension offset, as the pension offset itself, were entirely prospective in application.

were largely window dressing for stereotypical thinking about women.[11] In fact, not all those protected by this legislation were actually close to retirement in 1977 or even necessarily now. In order to be eligible for and entitled to a pension under the federal Civil Service Retirement System, for instance, a person may be as young as 55 years old. See e.g., 5 U.S.C. § 8336(a). Therefore, a woman who turned 55 before December 1, 1982 will be eligible for the unreduced spousal benefit when she retires even if that does not occur for another 20 years.[12]

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11. The only exception is those couples like the Mathews where the husband had retired but not yet applied for spousal benefits prior to December 1, 1977. In fact, he applied on December 15, five days before the reenactment of the pre-Goldfarb law but 15 days after its effective date.

12. With some few exceptions, e.g., certain law enforcement officers, there is no general mandatory retirement age for federal employees. See Age Discrimination in Employment Act, 29 U.S. §631(b).

Thus, women in the protected class are conclusively presumed to have relied upon receiving the spousal benefit just as they had been -- and now are again -- conclusively presumed to have been dependent upon their husbands. In contrast, men like Mr. Mathews, who cannot prove dependence, are not even permitted to prove actual reliance on the benefit. They are irrebutably and conclusively presumed not to have relied on receiving the spousal benefit, even where they did so rely.

Because of its underlying stereotyped notions about women, the post-Goldfarb changes in the Social Security scheme provided their greatest benefit to women who may have needed it the least (e.g., career civil servants). These women are entitled to their full spousal benefit and their government pension. The legislative history, however, presents the older

woman who reenters the job market late in life and who might have been:

> "[d]ependent upon her husband for most of her life and might have earned little or nothing in the way of retirement income protection in her own right and yet be denied benefits if a dependency test were implemented." S. Rep. No. 95-572, 95th Cong., 1st Sess. (1977) p. 28. (emphasis added)

This stated concern ignores the fact that the pension offset provision obviously has no impact on the spousal benefits of any spouse who has nothing in the way of retirement income protection in her or his own right. The offset is dollar for dollar and does not even come into effect unless there is some governmental pension entitlement against which it can be offset. Women government workers who have earned little in the way of pension benefits would, in addition, be only mar-

ginally affected by a pension offset. Yet these women -- solely because they are women -- are permitted to retain their full spousal benefits and their government pensions, while similarly situated men are not.[13]

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13. The fact is that, assuming the luxury of a choice, a woman entering or re-entering the job market in federal or state civil service employment has a greater likelihood of earning at least some pension entitlement than a woman entering or re-entering social security covered employment. According to the recent data, in the private sector, approximately 49% of male employees, but only 21% of female employees, are covered by private pensions. Library of Congress Congressional Research Service Report Prepared for the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, House of Representatives, Women and Retirement Income Programs: Current Issues of Equity and Adequacy, (Comm. Pub. No. 96-190, at p. 3.)(1979). Of those retired persons receiving private pensions, male retirees receive pensions about 40% higher than female retirees. Ibid. at 4. Re-entry women are less likely to be eligible for private pensions even where they exist. Under the Employee Retirement Income Security Act (ERISA), private pension rights do not vest until a person has worked a

(footnote continued on following page)

Stereotypes about men are also evident in the legislative history of this provision. The requirement of equal treatment for men laid down in Goldfarb is said repeatedly to have resulted in a "windfall" for men. The use of a word like "windfall" is particularly unfortunate since it implies that the recipient has selfishly received unearned gains. Interestingly, it is applied only to men when they become eligible for a benefit based upon the labor of their wives which similarly situated women have long received based upon the labor of their husbands. However it is characterized, it nonetheless

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minimum number of years (usually ten) under the plan, see generally 29 U.S.C. §§1052,1053, whereas under the federal system a worker can be eligible for a pension after only five years. 5 U.S.C. §8333. Furthermore, such a woman would, of course, have to choose between her own Social Security benefit and her spousal benefit; she cannot receive the full amount of both. 42 U.S.C. §402(k)(3).

is the same benefit for women as for men. Both men and women expected these benefits would be available in accord with the decisions of this Court.

As in Califano v. Goldfarb and Weinberger v. Weisenfeld, this statutory scheme discriminates against one particular category of family -- one in which the female spouse is a wage earner covered by Social Security. Because of the reenactment of pre-Goldfarb standards for eligibility, the labor of women like Mary Mathews in Social Security covered employment is demeaned and undervalued in comparison with the labor of similarly situated men. Similarly situated men can deliver the full spousal benefit to their family units (including themselves) or their surviving widows, but women

cannot.[14] Here, as in Weinberger v. Weisenfeld, the statutory provision imposes "a gender based distinction which diminishes the protection afford to women who do work." 420 U.S. at 648. As such, it is not substantially related to an important government interest.

2. No Legitimate Sex-Neutral Governmental Interest is Served by the Classification, and Any Interest That is Served is Not Sufficiently Narrowly Tailored.

The government identifies its interests in the sex-based exception to the pension offset provision as the furthering of the financial security of individual re-

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14. Indeed, Mary Mathews suffers a double discrimination. Her years of private employment do not yield the benefits received by men who worked in government employment and her own standard of living is reduced directly as a result of her husband's ineligibility for spousal benefits.

tirees and their families[15] and the collective interest of "ensuring citizens have confidence in the just and orderly processes of government." (App. Br. at 34). But, as discussed above, the government cannot so easily justify its purported furthering of the financial security of one group of individuals and their families over that of another group of individuals and their families, solely on the basis of sex.

Why is the asserted reliance of female workers on the right to the spousal benefit any more "legitimate" (App. Br. 33) than the same reliance of the male workers? There is no showing or reason to believe that more members of either group had relied to any greater extent than members of the other group. Cer-

15. The stated concern for financial security of retirees and their familes however, is, belied by the requirement of the severability clause that all spousal benefits be offset if the exception clause is invalidated.

tainly both men and women had an expectation of receiving benefits. To say that the women government workers may not be the most needy as a group (supra, pp. 31-34) is not to denigrate the importance of their expectation of a certain retirement income. The failure, however, to include the same concerns of male workers renders the exception impermissibly underinclusive. Congress' preference for the women's expectation interest in the face of the Court's decision to the contrary cannot be justified. To say that men had an expectation of spousal benefits "only as a result of the Goldfarb decision" (App. Br. at 38)(emphasis added) is to denigrate this Court and the judicial process. Surely the "just and orderly processes of government" on which all citizens rely must include both the process of the judiciary and of the legislature to the same degree.

Even if a legitmate sex-neutral governmental interest could be identified here, the congressional response is not sufficiently narrowly tailored. In order to be closely and substantially related to such a governmental interest, the legislation would have to have been, as it could have been, far more carefully and narrowly drawn. Congress could have instituted a dependency test, as used for the first six months of 1983 (Pub. L. No. 97-455). It could have instituted a test for actual reliance.[16] Administrative inconvenience is an insufficient ground for refusal to engage in individualized findings where sex is used as a proxy for some other factor. See, e.g., Reed v. Reed, 404 U.S. 71 (1971); Orr v. Orr. As noted

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16. Mary and Robert Mathews could have satisfied such test since they retired prior to December 1977 actually believing they would receive the spousal benefit.

by this Court in Heckler v. Campbell, ___ U.S. ___, 51 U.S.L.W. 4561 (May 16, 1983), the "Social Security hearing system is 'probably the largest adjudicative agency in the western world'" (citation omitted), requiring more than a quarter of a million hearings a year. Id. at 4562 n.6. It is thus presumably well equipped to hold the necessary hearings on reliance or dependency. Alternatively, Congress could have phased in the pension offset for both men and women on an equal basis or it might have utlized a partial pension offset, as it ultimately did for all persons eligible to retire after June 30, 1983 (Pub. L. No. 98-21). Congress chose to do none of these but instead simply re-enacted an unconstitutional law. Neither

its "transitional" trappings[17] nor the new, but suspiciously familiar reasons can save this unconstitutional act.

II. CONGRESS' ATTEMPT TO INSULATE AN UNCONSTITUTIONAL DISCRIMINATION FROM JUDICIAL REVIEW IS VIOLATIVE OF THE SEPARATION OF POWERS.

Assuming that this Court reaffirms Goldfarb and finds that the exception clause of the pension offset provision is unconstitutional, the question then becomes whether Congress may validly deny any relief to appellees for the con-

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17. The five year delay by Congress in effectuating equal benefits cannot be compared to the judicial stays cited by the government. In Northern Pipeline Construction Co. v. Marathon Pipeline Co., ___ U.S. ___, 73 L.Ed.2d 598 (1982) the Court stayed its own judgment for three months. The stay was ultimately extended for an additional three months, allowing a total stay of approximately six months. 51 U.S.L.W. 3259 (Oct. 4, 1982). In Buckley v. Valeo, 424 U.S. 1 (1976) the Court stayed its judgment for thirty days. Furthermore, those who qualify for the exception to the offset will receive full benefits, not for a transitional period, but permanently, for their entire lifetimes.

stitutional wrong they have suffered. Congress directed that if its attempts to provide discriminatory treatment for certain spouses were successfully challenged, all Social Security spousal benefits -- to both men and women -- were to be subject to the pension offset. Defended as a mere "severability clause" by the Solicitor General, the clause, in fact, has the intent and effect of insulating an unconstitutional discrimination from judicial review by destroying Article III standing to attack it, by removing the power from the Court to remedy it, and by penalizing persons for seeking to prevent its implementation. In effect, Congress has provided that if A challenges a statute which unconstitutionally provides a benefit to B but not to A, then both A or B must lose benefits. While the remedial issues surrounding a challenge to an underinclusive statute are difficult,

see, e.g., Califano v. Westcott, 443 U.S. 76 (1979), one clearly inappropriate response is for Congress to mandate that this Court must automatically nullify the entire program.

The role of judicial review in the separation of powers could not survive if Congress were permitted to attach automatic Draconian consequences to the successful exercise of judicial review. If, for example, Congress deprived welfare recipients of the vote, it could hardly provide that the result of a successful judicial challenge to the statute would be the immediate termination of all welfare payments. Similarly, Congress cannot seek to deter judicial review of underinclusive statutes by threatening Draconian consequences should the previously worded congressional statute again be deemed unconstitutionally discriminatory.

It is, of course, a truism to note that separation of powers is the fundamental organizing principle of our system of government. As this Court recently observed, adherence to the structural restraints imposed by separation of powers remains a crucial bulwark of freedom. Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 51 U.S.L.W. 4907 (June 23, 1983).

Our system of separation of powers divides governmental authority into three functions: The making of laws, which is confided to the legislative branch acting pursuant to procedures spelled out in Article I of the Constitution; the administration of laws, which is confided to the executive branch acting pursuant to authority conferred by Article II; and the resolution of disputes concerning the meaning and constitutionality of laws, which is confided to the judiciary by

Article III of the Constitution. While the functions are hardly watertight and while the Constitution pre-supposes a degree of inter-branch cooperation, this Court has recognized that an attempt by one branch to inhibit the performance of functions which are confided to another by the Constitution is violative of separation of powers, and is, therefore, void.

Just as it has protected Congress from encroachment by the executive, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Schechter Poultry v. United States, 295 U.S. 495 (1935); and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the judiciary from encroachment by the executive, United States v. Nixon, 418 U.S. 683 (1974), the executive from encroachment by Congress, e.g., Buckley v. Valeo, 424 U.S. at 120-143, Springer

v. Phillipine Islands, 277 U.S. 189 (1928), and Immigration and Naturalization Service v. Chadha, and Congress from the encroachment by the judiciary, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849)(the political question doctrine generally) and Rostker v. Goldberg, this Court has scrupulously protected the judicial function from legislative encroachment. For example, in United States v. Brown, 381 U.S. 437 (1965) and United States v. Lovett, 328 U.S. 303 (1946), the Court declined to permit Congress to impose legislative punishment on individuals, noting that the function was vested in the judiciary. See also Groppi v. Leslie, 404 U.S. 496 (1972). In Northern Pipeline Construction Co. v. Marathon Pipeline Co., this Court invalidated portions of the Bankruptcy Act which sought to confer Article III powers upon Article I judges.

Most significantly, in United States v. Klein, 80 U.S. (13 Wall) 128 (1872) this Court refused to permit "Congress to dictate the evidentiary value of a Presidential pardon, noting that Congress has inadvertently passed the limit which separates the legislative from the judicial power." Id. at 147.

Since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), it has been clear that one of the critical functions assigned to the Article III judiciary is to "say what the law is" in disputes which call into question the constitutionality of legislative or executive conduct. Despite occasional ill-considered threats, rarely has Congress or the President sought to prevent an Article III court from carrying out its constitutional responsibilities. Compare United States v. Klein with Ex parte McCardle, 74 U.S.

(7 Wall) 506 (1869). Indeed, in those settings in which interference may be said to have occurred, the Court has firmly rebuffed it.

In United States v. Klein, Congress enacted a statute which purported to fix the meaning which a court could give to a Presidential pardon in a case pending before it. The Court, recognizing the statute as an interference with the judicial function, promptly invalidated it. Similarly, the Court has declined to give effect to legislative presumptions which force courts to make findings of fact on insufficient evidence,[18] and has refused to construe congressional statutes to preclude judicial review. E.g., Johnson v. Robinson, 415 U.S. 361, 366, n.8 (1974); Oestereich v. Selective Service System, 393 U.S. 233, 240, 243 (1968)

18. See generally Leary v. United States, 395 U.S. 6 (1969).

(Harlan, J., concurring).

This case poses a new and dangerous challenge to judicial review. Instead of openly usurping the judicial function as in Brown or Lovett, or assigning it to an Article I official as in Marathon Pipeline, or explicitly removing jurisdiction as in Klein or Ex parte McCardle, Congress has sought to exercise a legislative veto over the judiciary by preventing the exercise of judicial review by (1) removing standing from any challenger; (2) by in effect, removing from the courts, jurisdiction to give any remedy other than recision of all spousal benefits; and (3) imposing a punishment as the price for obtaining judicial review. However, just as a legislative veto over the executive was invalid in Chadha, so the legislative veto over the judiciary is invalid in this case. By providing that if the judiciary carries out its duty to condemn

the sex discrimination inherent in this statute, the entire exception terminates, Congress has sought to insulate its statute from judicial review and, thus, has violated the principle of separation of powers.

Congress' attempted legislative veto of judicial review operates in the following ways. First, it deprives plaintiffs of Article III standing to challenge the statute by providing that success on the merits cannot be translated into a tangible benefit. As the Court noted in Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO), 426 U.S. 26 (1976), Article III requires that a judicial decision be capable of resolving the case or controversy which triggered it. In EKWRO this Court ruled that a District Court lacked Article III power to pass on the legality of granting tax benefits to hospitals which failed to serve the poor

because no assurance existed that, even in the absence of such benefits, hospital care for the poor would improve.[19] See also Warth v. Seldin, 422 U.S. 490 (1975). Indeed, in Orr v. Orr, this Court noted that it was the possibility of a favorable legislative response which provided standing in many under-inclusiveness challenges. Here, of course, Congress has precluded a favorable legislative response by providing for the automatic termination of the exception.[20] Similarly,

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19. In the view of amici EKWRO was wrongly decided because it is reasonable to assume that hospitals could and probably would have changed their practices in order to retain tax exemptions.

20. Nor is the lame suggestion of the Solicitor General that standing may be bestowed by the hope that this Court would invalidate the automatic cut off provision persuasive. While such a hope might provide standing for an initial challenge to such a statute, were its validity upheld by this Court, no future litigant could harbor a reasonable hope of invalidating it.

in this case, given the automatic loss of benefits imposed by Congress as the price of judicial review, any plaintiff may well, under EKWRO, lack Article III power to challenge the obviously discriminatory aspects of the statute because no possibility exists of alleviating plaintiff's injury in fact. In effect, therefore, Congress has re-enacted an unconstitutional statute and simultaneously sought to insulate it from judicial review in flat violation of basic principles of separation of powers.

Second, the result imposed by Congress on the judiciary in the event of a successful challenge to the gender discrimination is, in effect, a selective deprivation of the Court's jurisdiction; it purports to remove the ability of the Court to exercise its full remedial power over the controversy. Congress cannot undo the Supreme Court's constitutional

doctrine by simple legislative fiat, and it should not be able to accomplish the same end by manipulating the courts' jurisdiction.[21] In United States v. Padelford, 76 U.S. (9 Wall) 531 (1870), the Court ruled that a presidential pardon allowed its recipients, supporters of the Confederacy in the Civil War, to recover confiscated property. Congress reacted to Padelford by passing legislation which both (1) declared that a pardon could not cure disloyalty, that acceptance of such a pardon was in fact conclusive proof of disloyalty, and (2) ordered the Court of Claims and the Supreme Court to dismiss all pending claims by pardonees for confiscated property for lack of jurisdiction. The Court in United States v. Klein

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21. Sager, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 68 (1981).

invalidated this attempt by Congress to impose upon the judiciary a rule of decision which limited its power to effectuate its decisions. The Court there noted:

> "The language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. (13 Wall.) at 145.

Regardless of whether Congress intended to deprive the Court of full jurisdiction to adjudicate constitutional rights it cannot promulgate legislation which has that precise effect. Jurisdictional limitations cannot survive if substantive provisions of legislation are unconstitutional, Battaglia v. General

Motors, 169 F.2d 254,257 (2d Cir. 1948). The legislation at issue here abrogates judicially recognized rights and, in effect, simultaneously deprives its victims of a judiciary empowered to remedy their claims fully and independently.

Finally, by penalizing persons who are dependent on the program in question by terminating the exception if the discrimination is prohibited, Congress has created an enormous practical disincentive to judicial review of its blatantly unconstitutional action. This Court has already held that access to the judicial process may not trigger the imposition of a punishment. For example, persons who have succeeded in setting aside a criminal conviction may not,

ordinarily, receive a harsher sentence on a re-conviction in the absence of a clear justification. North Carolina v. Pearce, 395 U.S. 711 (1969). The automatic invalidation clause penalizes the exercise of the right to seek judicial review in a subtle but very compelling way. Most people would shrink from depriving their fellow citizens of a benefit if they could have no possibility whatever of thereby gaining any tangible advantage for themselves. It is more than an exercise in futility; it threatens to work a positive deprivation upon others who have never harmed the would-be plaintiff. A challenger to such a scheme may realistically expect to receive the opprobrium of those who will suffer as a result of the exercise of his ultimately symbolic rights. Any

statute which provides that the price of judicial review is the automatic unreviewable termination of both the valid and invalid aspects of the program cannot be tolerated.

Of course, recognizing that Congress cannot impose a legislative veto over judicial review is not the equivalent of arguing that benefits in an underinclusiveness case must or may always be equalized at the higher level. While courts or legislatures may equalize they need not necessarily do so. Several remedial options are open in an underinclusive setting: equalizing, if necessitated by constitutional principles and if economically feasible; recal-

culation of benefits to spread the original economic package over the enlarged class of beneficiaries; and remand to the legislature for a decision on the structure of the program in light of constitutional prohibition on existing discrimination. Pursuant to this Court's decision, Congress would, of course, have broad discretion to restructure the program, subject to two overriding limitations -- the gender discrimination may not be reinstated and the beneficiaries may not be penalized for having subjected Congressional discrimination to judicial review.

CONCLUSION

For the foregoing reasons the decision of the district court should be affirmed.

Respectfully submitted,

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August 30, 1983